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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RAFIEL L.-B.,)	
)	
Appellant,)	2 CA-JV 2009-0067
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
ARIZONA DEPARTMENT OF)	Not for Publication
ECONOMIC SECURITY and)	Rule 28, Rules of Civil
LEILANI L.-B.,)	Appellate Procedure
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18239800

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

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ECKERSTROM, Presiding Judge.

¶1 Rafiel L.-B. appeals from the juvenile court's order terminating his parental rights to daughter Leilani, born in December 2006, on the grounds of mental illness or chronic substance abuse and length of time in care, both nine months or longer and fifteen months or longer. *See* A.R.S. § 8-533(B)(3), (8)(a), (c). Rafiel challenges the sufficiency of the evidence to support the court's order. For the reasons stated below, we affirm.

¶2 In February 2007, Rafiel took then-two-month-old Leilani to a Child Protective Services (CPS) office, where he used a name other than his own and acted as though Leilani were not his child. He subsequently admitted he was her father but told CPS caseworkers he did not want his current girlfriend, Michelle, to know about Leilani. In May 2007, CPS took custody of Leilani, and the Arizona Department of Economic Security (ADES) filed a dependency petition alleging Leilani was dependent as to both Rafiel and her mother, Katelyn. ADES alleged Katelyn was not attached to the child and had exposed the child to domestic violence. ADES alleged Rafiel lacked a custody order, had voluntarily placed the child with CPS, and had a history of domestic violence. Leilani was placed with her maternal grandmother and the grandmother's husband, where she remained throughout the dependency. Although Rafiel denied the allegations of the petition, he submitted the matter to the juvenile court without presenting evidence, and the court adjudicated Leilani dependent as to Rafiel on June 15, 2007. The court adjudicated Leilani dependent as to Katelyn on July 11, after she admitted allegations in an amended petition. The initial case plan goal was reunification of the family.

¶3 The parents were provided a panoply of services designed to attain the goal of reunification. But, after a permanency hearing and after Rafiel subsequently tested positive for cocaine and ecstasy, ADES filed a motion to terminate the parents' rights to Leilani in October 2008. After a hearing over eleven days between January and April 2009, the juvenile court granted the motion and terminated both parents' rights in a thorough, seven-page order that contains extensive findings of fact and legal conclusions.

¶4 Rafiel contends on appeal there was insufficient evidence to support the juvenile court's order, arguing, first, that the order "was clearly erroneous" because "he had care, custody and control of his other child [and] . . . ha[d] the three children of his significant other living with him without state involvement." He also argues ADES did not establish with clear and convincing evidence that he was unable to discharge his parental responsibilities as a result of chronic substance abuse or mental illness, as required to terminate his parental rights pursuant to § 8-533(B)(3). Rafiel further contends ADES did not present sufficient evidence that he had failed to rectify the circumstances that caused Leilani to remain out of the home pursuant to court order for purposes of § 8-533(B)(8)(a) or (c).

¶5 The gravamen of Rafiel's challenge to the sufficiency of the evidence under § 8-533(B)(8) is that the juvenile court's conclusion was based solely and insufficiently on his mere failure to comply fully with the case plan. He contends, "When a court inextricably ties a parent's lack of full compliance with a case plan with an inability to parent, that court is clearly erroneous." He points to testimony and other evidence that he "and his significant

other appropriately parent[ed] the four children living in their care,” which he insists “is conclusive evidence that [he] can safely and appropriately parent Leilani.”

¶6 We will affirm the juvenile court’s order as long as the factual findings upon which it is based are supported by reasonable evidence. *See Jennifer B. v. Ariz. Dep’t of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). We view the evidence and all reasonable inferences from that evidence in the light most favorable to sustaining the court’s order. *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002). We do not reweigh the evidence. *See Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005). The juvenile court is the trier of fact and, therefore, “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004).

¶7 Section 8-533(B)(8)(c) provides a parent’s rights may be terminated if

[t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order . . . , the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

The juvenile court made findings mirroring this statutory language as well as other extensive findings of fact. We adopt most of the order, except those portions we find contradictory and address below. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08. Although no purpose

would be served in rehashing the court's order in its entirety here, we refer to portions of the order as necessary in responding to Rafiel's arguments on appeal.

¶8 The juvenile court found Rafiel lacked credibility and consequently rejected much of his testimony. The court found that, “[w]ith the recurring lies, half truths, and withheld information[,] it is clear that [Rafiel] has put himself first above all others.” Because of his deception, the court noted, in-home therapist Traci Butler had “called it quits. She had helped him as best she could but he had made the decision that his drinking alcohol was not a problem. As proven by the positive tests for alcohol [Rafiel] was lying to her about his use.” Given the lies he had told to so many people, the court added, “it is impossible to determine what is fact and what is fiction.” The court clearly found Rafiel disingenuous in his professed commitment to Leilani and to fully complying with the case plan. There is ample evidence in the record supporting these findings of fact.

¶9 The juvenile court noted the psychological evaluation of Rafiel performed by Dr. Ralph Wetmore and Wetmore's testimony. Wetmore questioned Rafiel's veracity with respect to a variety of matters, including his use of drugs and alcohol. He diagnosed Rafiel with narcissistic personality disorder, explaining how this affected Rafiel's ability to parent. Specifically, as the court pointed out, Wetmore explained that Rafiel had a grandiose sense of self-importance, lacked empathy, and put himself before others. The court observed that Rafiel had insisted he was not using drugs or alcohol, had repeatedly promised he would stop drinking alcohol, and had stated he had complied with the testing requirements although the record established the contrary. Wetmore insisted that Rafiel achieve a six- to nine-month

period of sobriety, a legal source of income, and establish that he had participated in anger management/domestic violence classes before he would be able to demonstrate his commitment to providing a safe home for Leilani.

¶10 The juvenile court also pointed out that, based on a hair-follicle test obtained on April 25, 2008, just after the permanency hearing, Rafiel had tested positive for amphetamines, ecstasy, cocaine, benzoylecgonine, and cocaethylene. Further, the court noted Rafiel had yet to provide proof of a legal source of income as required. The court found that throughout the dependency Rafiel had been told he must be fully compliant, yet he tested positive for alcohol in August 2008 and September 2008 and for ethyl glucuronide on three occasions in December. The court found that Leilani had been out of the home for longer than fifteen months and that Rafiel had not benefitted sufficiently “from his participation in services to put Leilani first and complete his entire case plan.” The court added, “That alone is sufficient to show that he was unable to remedy the circumstances that caused Leilani to remain out of his home.”

¶11 When a parent fails to complete and benefit from appropriate reunification services such as those provided here, that fact can be regarded as evidence the parent failed to remedy the circumstances that caused the child to remain out of the home pursuant to court order. It is true, as Rafiel points out, that a parent’s mere failure to comply fully with the case plan is not enough to establish the parent substantially neglected or willfully refused to remedy the circumstances for purposes of nine-month out-of-home placement under § 8-533(B)(8)(a), when the parent has made a good faith effort to comply. *See In re Maricopa*

County Juv. Action No. JS-501568, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App. 1994) (“[P]arents who make appreciable, good faith efforts to comply with remedial programs outlined by ADES will not be found to have substantially neglected to remedy the circumstances that caused out-of-home placement [for purposes of § 8-533(B)(8)(a)], even if they cannot completely overcome their difficulties”). But to terminate a parent’s rights based on the ground of fifteen-month out-of-home placement, the juvenile court is not required to find substantial neglect or willful refusal, only that the parent has failed to remedy those circumstances and likely will continue to do so, despite appropriate reunification efforts. *See* § 8-533(B)(8)(c).

¶12 Moreover, contrary to Rafiel’s contention, the juvenile court did not terminate his rights simply because he did not comply fully with the case plan. Implicit in the court’s order is that the court did not believe Rafiel had made a good faith effort to benefit from the services ADES provided and thus to remedy the circumstances that caused Leilani to remain out of the home.¹ He was unable to maintain sobriety for any sustained period of time. He did not establish a legal source of income as the case plan required. As the court noted, the

¹We note the juvenile court’s order appears inconsistent on its face. On the one hand, the court found Rafiel had not benefitted sufficiently to warrant placing Leilani in his home; on the other hand, the court found Rafiel to be so deceptive that it was difficult to separate the truth from lies and “impossible to determine if he has benefit[t]ed from the services he was offered.” Nevertheless, we think it is clear from the order as a whole that the court simply did not give credence to Rafiel’s assertions and thus did not view his partial compliance with the case plan as reflecting a good faith effort to do what was necessary so he could reunite with Leilani. Nor did the court believe Rafiel would be able to parent her adequately. These findings, implicit and express, are based on the juvenile court’s weighing the evidence and assessing credibility, functions entrusted to the discretion of the court.

in-home family therapist testified Rafiel had demonstrated an unwillingness to change, suggesting further services would be futile. Rafiel had not taken responsibility for placing Lelani with CPS and refused to recognize the significant role his alcohol abuse played in perpetuating Leilani's dependent status and delaying her return to the home.

¶13 Although Rafiel's argument that his demonstrated ability to parent other children negates the juvenile court's findings is primarily related to his challenge to the court's termination of his rights on the ground of mental illness or chronic substance abuse, he also suggests the same with respect to the length-of-time-in-care ground. But we reject that argument. Again, it was for the court to weigh the evidence, including the evidence that four children, including one of his own, were living in the home he shared with Michelle. Despite that evidence, there was other reasonable evidence to support the finding that Rafiel had failed to remedy the circumstances that caused Leilani to remain out of the home and that he would not be able to exercise proper and effective parental care and control of her in the near future. Although the other children in the home were considered to be at risk to a certain degree, CPS had not taken them into protective custody primarily because Michelle was considered to be a buffer and the primary caretaker. But, as ADES points out, there was evidence that the interrelationships between Michelle, Rafiel, and Katelyn were a potential source of tension and a complicating factor in their lives and the other children's. Leilani would be at risk in such circumstances, not least because Michelle might not protect Leilani to the same extent as she would her own children.

¶14 Moreover, although Rafiel insisted Michelle was supportive of having Leilani in the home and that the two had a stable relationship, there was evidence to the contrary. Again, it was for the juvenile court to weigh and assess that evidence and resolve any conflicts. Ultimately, it found Rafiel was deceitful and had failed to remedy the circumstances that caused Leilani to have remained, almost since birth, with her maternal grandmother and her husband. Because Leilani was well cared for by them and they wished to adopt her, the court found it was in her best interests for Rafiel’s parental rights to be terminated so that her placement with her grandmother and stepgrandfather could become permanent. Rafiel does not challenge the sufficiency of the evidence to support the court’s finding in this regard, and ADES sustained its burden under § 8-533(B)(8)(c).

¶15 Because we affirm the juvenile court’s order terminating Rafiel’s rights on this ground, we need not address the arguments that relate to other grounds on which the court also found severance justified. *See Antonio M. v. Ariz. Dep’t of Econ. Sec.*, 222 Ariz. 369, ¶ 4, 214 P.3d 1010, 1012 (App. 2009).

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge